Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-1710

In the Supreme Court of the United States

OCTOBER TERM, 1982

FOX RIDGE ASSOCIATES & CO.,
APPELLANT,

v.

BOARD OF ASSESSORS OF
THE TOWN OF MARSHFIELD,
APPELLEE.

MOTION TO DISMISS AND BRIEF OF THE APPELLEE IN OPPOSITION TO JURISDICTIONAL STATEMENT

JOHN F. RIDGE
ROCKLAND TRUST BUILDING
CUSHING PLAZA
COHASSET, MASS. 02025
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Attorney for the Appellee
Special Town Counsel for
the Town of Marshfield

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I

QUESTION PRESENTED

Appellee disagrees with the question presented by the Appellant because it is misleading. The question should read as follows:

> Whether the decision rendered against the Appellant, who waived its right under Section 10 of the Massachusetts G.L. Ch. 58A, by not requesting a stenographic record of the proceedings before the Massachusetts Appellate Tax Board ("ATB") and also by not complying with the Rules of Practice and Procedure of the Appellate Tax Board, in order for the Appellant to perfect his appeal of Fox Ridge Associates & Co. ("Fox Ridge") to the Massachusetts Supreme Judicial Court to be decided on the merits, violates Section 1 of the Fourteenth Amendment of the Constitution of the United States?

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BOARD OF ASSESSORS OF
THE TOWN OF MARSHFIELD,
APPELLEE.

MOTION TO DISMISS AND BRIEF OF THE APPELLEE IN OPPOSITION TO JURISDICTIONAL STATEMENT

Statement of the Case

The Appellant, Fox Ridge Associates & Co., was the record owner of certain parcels of real estate located in Marshfield on January 1, 1978 and January 1, 1979 for Fiscal Years 1979 and 1980. Both fiscal years were seasonably filed with the Marshfield Board of Assessors and the Appellate Tax Board, and the appropriate amount of taxes paid. For purposes of this appeal only the Fiscal 1980 case is before this Court.

This issue before the Appellate Tax Board was overvaluation of the real estate and disproportionment assessment. Evidence was presented by the Appellant using the capitalization of income approach to value and further evidence was introduced with the ratios of the Department of Revenue statistics relative to the claim of disproportionment assessment practices of the Town.

The Marshfield Board of Assessors did not present themselves at the hearing because of conflicting schedules on the part of the assessors and counsel, and their appraiser not having had a chance to complete his report. Motions were brought for a continuance and were denied to give the Town the opportunity to adequately prepare its case. Motions at a later date were allowed, and the Town was of the opinion that their case would be heard at that time.

Appellant sought a Declaratory Judgment in Suffolk Superior Court Docket #42917, barring the Appellee from going forward. Subsequently the Appellate Tax Board denied the Appellee to present its case.

A decision was rendered by the Appellate Tax Board on October 22, 1980. Abatements were granted to the Appellants. The Appellants seasonably requested Findings of Fact and Report which was promulgated February 4, 1982. The decision of the Appellate Tax Board rendered on October 22, 1980, and the Findings of Fact and Report are not inconsistent of the Appellate Tax Board's practice and procedure.

Reasons for Allowing the Motion to Dismiss

The Supreme Judicial Court of Massachusetts correctly determined that the Appellant was not deprived of his rights and cited cases that the Appellee has included in its Table of Citations.

The Appellee submits that the taxpayer failed to request and secure a stenographic transcript for inclusion in the record on appeal. This right was given to the taxpayer prior to the hearing which was his prerogative to accept or reject compliance thereof.

In *Coomey, et al.* v. *Board of Assessors of Sandwich*, 367 Mass. 836, (1975) the court held that the scope of permissible review in this case is narrow. It stated that a review by the Court from the Board is limited to questions of law. The decision of the Board as to findings of fact is final. Because no stenographic transcript of the proceedings was made or requested, it cannot consider whether as a matter of law the evidence before the Board warranted its findings and as it is based on unreported evidence, they cannot be disturbed. We have before us none of the oral testimony which is described generally in the Board's report and cannot judge its sufficiency. Accordingly, the taxpayer's arguments which, in essence, question the sufficiency of the evidence to support the Board's decision are foreclosed by the state of the record.

The case presented by Fox Ridge Associates & Co., presented one witness to whom the Board found to disregard certain portions of his testimony through his appraisal. The appraisal was not made part of the record on appeal.

The Appellant has shown no conflict in the Board's decision or the subsequent review by the Supreme Judicial Court in its decision. Indeed the Appellant was granted abatements as to the findings of the Commissioner and the full Board in its decision. His rights under the due process clause were certainly not violated with respect to due process or any other freedoms of which he had opportunity to prevail himself at the outset of the proceedings.

Conclusion

For the foregoing reasons, the Motion to Dismiss should be allowed, and the Appellant does not present a substantial question to be reviewed.

Respectfully submitted,

JOHN F. RIDGE
ROCKLAND TRUST BUILDING
CUSHING PLAZA
COHASSET, MASS. 02025
(617) 383-9500
Attorney for the Appellee
Board of Assessors of
the Town of Marshfield

**Counsel of Record*

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* Special Town Counsel for the Town of Marshfield, Massachusetts

APPENDIX A

MASSACHUSETTS GENERAL LAWS

Ch. 58A, § 10. Stenographic reports; costs; waiver of appeal

At the request of any party made before any evidence is offered, the board shall order that all proceedings in a pending appeal be officially reported by a stenographer. The board may contract for the reporting of such proceedings at the expense of the commonwealth in the first instance, but shall collect the cost thereof from the persons requesting that the proceedings be reported. In such contract the board may provide that one or more copies of the transcript be supplied to the board without cost to the commonwealth, and may fix the terms and conditions upon which transcripts will be supplied to other persons and agencies by the stenographer. No proceedings shall be reported officially until an amount equal to the cost thereof, as estimated by the clerk, shall have been deposited with him at such times and in such manner as may be provided by the rules of the board. Any excess deposit over the actual cost shall be returned to the depositor by the clerk. If no party requests that the proceedings be reported, all parties shall be deemed to have waived all rights of appeal to the supreme judicial court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence. The right of appeal upon questions of law raised by the pleadings or by an agreed statement of facts or shown by the report of the board shall not be deemed to be waived. For its own information only, the board shall have stenographic notes of hearings taken and may have transcripts thereof prepared in proceedings which are not officially reported at the request of a party.

Amended by St.1933, c.321, § 5.

APPENDIX B

Rules Of Practice And Procedure Of The Appellate Tax Board For The Commonwealth Of Massachusetts

Rule 28. Stenographic Report of Evidence. At the request of any party, made before any evidence is offered, the Board will order that all proceedings in a pending appeal be officially reported by a stenographer. Notice of such request shall be given to the clerk at least one day before the appeal is reached for hearing, but the Board in its discretion may permit later notice. The cost of reporting a proceeding officially shall include in every case the cost of one transcript for the Board, and additional transcripts may be obtained by any party from the stenographer upon the terms and conditions fixed by the contract of the Board with the stenographer. The party or parties requesting such report shall deposit with the clerk an amount equal to the cost thereof, as estimated by the clerk, at the time of making such request, and shall from time to time thereafter, on demand therefor, deposit with him such further amounts as in his judgment may be necessary to meet such cost. As soon after the hearing as the clerk shall ascertain the actual cost of such report, he shall refund to the depositor any excess deposit over the actual cost thereof, and he shall require the deposit of any deficit from the party or parties requesting the report. No proceeding shall be reported officially unless the amounts required have been deposited as herein provided. Unless so reported no portion of the evidence will be included in the record in an appeal to the Supreme Judicial Court.

Where any proceeding has been ordered officially reported and the cost of reporting thereof shall not be deposited by either party at any time with the clerk as required by the Board, the order for an official report shall become ineffective and no part of said proceeding shall be regarded as officially reported, but the stenographer shall furnish to the Board,

without cost to the Commonwealth, a transcribed copy of so much of the proceeding as has already been taken.

Stenographic notes of hearings taken and transcripts thereof prepared in proceedings which are not officially reported at the request of a party shall be for the information of the Board only, and will not be open to the inspection or available for the use of the parties.

APPENDIX C

Form 72.

The Commonwealth of Massachusetts

APPELLATE TAX BOARD
Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston, Mass. 02202

Fiscal year 1980

FOX RIDGE ASSOCIATES & CO.,

APPELLANT.

BOARD OF ASSESSORS OF THE TOWN OF MARSHFIELD,

APPELLEE.

DECISION

Decision for the appellant; abatements granted in the amounts stated in and based on the schedule set forth below, all pursuant to applicable law in general and to G.L. c. 58A, §14 in particular.

Docket Number	*Location*	*Assessed Valuation*	*Fair Cash Value*	*Equalized Tax Rate*	*Tax Assessed*	*Taxes Due*	*Abatement*
108292	738 Plain	$169,960	$348,270	.39	$15,466.36	$13,582.56	$1,883.80
108293	742 Plain	230,185	471,679	"	20,946.84	18,395.51	2,551.33
108294	794 Plain	342,445	701,715	"	31,162.50	27,366.91	3,795.59
108295	792 Plain	382,995	784,808	"	34,852.55	30,607.51	4,245.04
108296	682 Plain	145,920	299,009	"	13,278.72	11,661.37	1,617.35
108297	786 Plain	171,345	351,109	"	15,592.40	13,693.25	1,899.15
108298	782 Plain	171,180	350,770	"	15,577.38	13,680.06	1,897.32
108299	Plain St	198,880	407,531	"	18,098.08	15,893.73	2,204.35
108300	748 Plain	207,705	425,615	"	18,901.16	16,598.99	2,302.17
108301	756 Plain	211,280	432,941	"	19,226.48	16,884.70	2,341.78

APPELLATE TAX BOARD
By (s) RUTH L. KLEINFELD, Chairman.
(s) PETER J. ALLEN, Member.
(s) JOHN P. MULVIHILL, Member.
Date: Oct. 22, 1980 (s) RUDOLPHE W. OUELLETTE, Member.
(s) ROBERT R. LEBLANC, Member.
(SEAL) Attest: (s) RICHARD B. WILLIS,
Clerk of the Board.

APPENDIX D

1982 - 57

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

DOCKET NOS. 103482 - 103492, INCL.
108292 - 108301, INCL.

FOX RIDGE ASSOCIATES AND COMPANY

v.

BOARD OF ASSESSORS OF THE TOWN OF MARSHFIELD

Promulgated: February 4, 1982

These are appeals under the formal procedure pursuant to G.L. c. 59, §§64 and 65, as amended, from the refusal of the appellee to abate taxes on certain real estate owned by the appellant for the fiscal years 1979 and 1980.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, §13, as amended, and Rule 32 of the Rules of Practice and Procedure of the Appellate Tax Board.

Walter L. Sullivan, Esq., for the appellant.
John F. Ridge, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

Appellant was the owner of certain parcels of real estate located at Plain Street in Marshfield on January 1, 1978 and January 1, 1979, the applicable assessment dates, and all taxes were greater than $2,000.00. The following is a chart depicting information utilized by the board to determine jurisdiction:

Fiscal Year	*Application for Abatement*	*Taxes Paid*	*Denial*	*Appeal Filed*
1979	Dec. 22, 1978	Dec. 22, 1978	None	Apr. 11, 1979
1980	Dec. 13, 1979	Dec. 13, 1979*	Feb. 6, 1980	Feb. 29, 1980

* Docket No. 108296, taxes paid Nov. 28, 1979

Since all of the above enumerated filings occurred on the same date in the various years, the findings are applicable to all individual docket numbers.

With regard to the applications for abatement, it is found that they were filed within 30 days of the mailing of the tax bills.

With regard to the second-half tax payments for FY 1979, appellant was granted extensions up to and including May 1, 1980, and for FY 1980 the hearing on the merits was held on April 16, 1980 prior to the due date for the payment. Based upon all of this information, namely the timely payment of taxes and the timely filing of application for abatement and petitions to this board, jurisdiction is specifically found to hear all appeals.

The parcels include 20.44 acres of land, which is a composite of several irregular lots. It is improved with 23 wood, stucco and brick muti-family dwellings numbered 738-794 Plain Street and four wood and brick multi-family dwellings numbered 678-682 Plain Street. All of the structures contain 12 living units each with a mix of efficiency, one-bedroom and two-bedroom units. There is a total of 324 dwelling units ranging in size from 690 square feet to 900 square feet. There are also supporting facilities as follows: paved roads, parking areas, tennis courts, and a pool and cabana. The improvements were well maintained and the construction was of fair quality. For a more detailed description of the property, see Exhibit 10, pages 12-14, which were adopted by the board as findings of fact.

At the hearing, at which the appellee was not present, appellant introduced an expert who utilized the capitalization of income approach to value. He used the actual income and expense figures for calendar years 1977 and 1978. These are located at pages 21-23 and 25-27 of Exhibit 10. After deducting the expenses, he also allowed a "Reserve for Replacement" totalling $40,450.00 for short-lived items such as refrigerators, stoves, etc.

For FY 1979 the net income figure utilized was $489,207 to which was applied a capitalization rate of .16, comprised of .093 rate of return, .0286 depreciation recapture and .0403 tax factor. Thus, he arrived at a fair cash value figure of $3,000,000.00. For FY 1980 the net income figure utilized was $452,610 to which was applied a capitalization rate of .16, comprised of .093 rate of return, .0286 depreciation recapture and .0382 tax factor. Thus, he arrived at a fair cash value figure of $2,800,000.00.

Since no evidence was presented by the appellee, the board adopted the gross figures of the appellant, as follows: FY 1979, $869,061, and FY 1980, $884,386. The board found that the expenses applicable to both years were the following categories provided by the appellant: operating, maintenance and payroll tax and insurance. The board also utilized a 6% of gross income as management fee. This was higher than used by the appellant because cash values:

FY 1979—$4,682,900
FY 1980—$4,574,000

Abatements were granted in accordance with the decision, a copy of which is attached.

OPINION

Two issues are raised by these appeals: overvaluation and disproportionate assessment.

As to overvaluation, the standard to be used in determining "fair cash value" is well known and without dispute. It is the price at which a willing seller, not under compulsion to sell, will sell and a willing buyer, not under compulsion to buy will buy the property in question, each party having full knowledge of all relevant facts. *Boston Gas Company* v. *Assessors of Boston*, 334 Mass. 549 (1950).

The decision of the board, although required to be based upon evidence presented, need not coincide with the valuation given by any witness. The market value of any real estate can-

not be determined with mathematical certainty, but must ultimately rest in the realm of opinion, estimate and judgment. *Assessors of Quincy* v. *Boston Consolidated Gas Company*, 309 Mass. 60 (1941). The board is not required to specify the exact manner in which it arrives at its fair cash value figures. *Jordan Marsh Company* v. *Assessors of Malden*, 359 Mass. 106 (1971).

The board used an effective tax factor in its capitalization rate in arriving at the fair market value of the subject property. The purpose of a tax factor in a formula for capitalizing earnings is to reflect the tax which will be payable on the assessed valuation produced by the formula; where the fair cash value determined by the capitalization of earnings is to be reduced in arriving at the assessed valuation, the tax factor must be proportionately reduced. See *Assessors of Lynn* v. *Shop Lease Company, Inc.*, 364 Mass. 569, 573 (1974).

As to disproportionate assessment for the fiscal year 1979, a taxpayer has a right to have his assessment reduced so that it is "proportional to the assessments of the class of property valued at the lowest percentage of fair cash value." *Assessors of Weymouth* v. *Thomas E. Curtis and Others Trustees*, 1978 Adv. Sh. 1676, 1684, quoting *Shoppers World, Inc.* v. *Assessors of Framingham*, 348 Mass. 366, 377 N. 10 (1965); *Tregor* v. *Assessors of Boston*, 1979 Adv. Sh. 770.

The board can utilize the equalization studies prepared by the Commissioner in arriving at a figure for the disproportionate assessment. See M.G.L. c. 58A, §12C; *Tregor*, supra at p. 779; and *Kenniston* v. *Assessors of Boston*, 1980 Adv. Sh. 1485 at 1498.

For years beginning in 1980, see G.L. c. 58A, §14; St. 1979, c. 797, §§10 and 14; *Kenniston*, supra; and Mass. Constitution, Art. 112.

These principles were applied by the board in determining the fair cash value for the appellant's real estate in these appeals.

Our decision was promulgated October 22, 1980.

APPELLATE TAX BOARD

By (s) John P. Mulvihill, Chairman

APPENDIX E

SUPREME JUDICIAL COURT

OF MASSACHUSETTS,

SUFFOLK

FOX RIDGE ASSOCIATES & CO.

v.

BOARD OF ASSESSORS
OF MARSHFIELD

Before HENNESSEY, C.J., and
WILKINS, LIACOS, NOLAN and O'CONNOR, JJ.

Walter L. Sullivan, Scituate, for plaintiff.
John F. Ridge, Cohasset, for defendant.

RESCRIPT
Argued Oct. 8, 1982
Decided Oct. 27, 1982

[1] Fox Ridge Associates & Co. (Fox Ridge) appeals from a decision of the Appellate Tax Board (board). The board granted an abatement in local real estate taxes, assessed for the 1980 fiscal year, in an amount not acceptable to Fox Ridge. We have no transcript of the evidence before us, and, therefore, we cannot pass on Fox Ridge's claim that the board's action was not supported by substantial evidence. *New Bedford Gas & Edison Light Co.* v. *Assessors of Dartmouth*, 368 Mass. 745, 749-751, 335 N.E.2d 897 (1975).

[2] Fox Ridge presented the only expert testimony as to the fair cash value of the property. The assessors did not appear at the hearing. Fox Ridge challenges certain of the board's determinations which rejected the position taken by Fox Ridge's expert. Because we do not have the evidence that was before the

board, we cannot say that the board lacked "a rational articulable basis in the evidence" (*New Boston Garden Corp.* v. *Assessors of Boston*, __ Mass. __, __, Mass.Adv.Sh. [1981] 1023, 1041, 420 N.E.2d 298 (1981)) for reaching different conclusions from those of Fox Ridge's expert on the appropriate capitalization rate and on the treatment of certain expense items. The board was not required to accept the testimomy of Fox Ridge's expert. *Assessors of Lynnfield* v. *New England Oyster House, Inc.*, 362 Mass. 696, 720, 290 N.E.2d 520 (1972). *Assessors of Quincy* v. *Boston Consol. Gas Co.*, 309 Mass. 60, 72, 34 N.E.2d 623 (1941).

Decision of the Appellate Tax Board affirmed.

APPENDIX F

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

Room 1412 Court House

Boston, Massachusetts 02108

(617) 725-8055

Patrick J. Hurley
Clerk

Frederick J. Quinlan
Assistant Clerk

November 23, 1982

Walter L. Sullivan, Esq.

8 Otis Place
P.O. Box 30
Scituate, Massachusetts 02066

Re: Fox Ridge Associates & Co.
vs.
Board of Assessors of Marshfield
Supreme Judicial Court No. SJC-2793

Dear Mr. Sullivan:

Your Petition for Rehearing in the above captioned case has been considered by the court and is denied.

Very truly yours,

s/ILLEGIBLE
Clerk

cc: John F. Ridge, Esq.
Rockland Trust Building
Cushing Plaza, Route 3A
Cohasset, MA 02025

APPENDIX G

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C., 20543

May 13, 1983

John F. Ridge, Esq.
Rockland Trust Company Building
Cushing Plaza, Route 3A
Cohasset, Massachusetts 02025

RE: Fox Ridge Associates & Co. v. Board of Assessors of Marshfield

A-82-1710

Dear Mr. Ridge:

Your request of May 10, 1983 for an extension of time within which to file a motion to dismiss or affirm the jurisdictional statement in the above-entitled case has been granted, and your time has been extended to and including June 13, 1983.

No request for a further extension of time will be entertained by the Clerk.

Very truly yours,
ALEXANDER L. STEVAS, *Clerk*

By s/FRANCIS J. LORSON
FRANCIS J. LORSON
Chief Deputy Clerk

gtb
cc: Walter L. Sullivan, Esq.